In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1031

DANIEL LOVALL SPIGNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The *per curiam* opinion of the court of appeals (Pet. App. B) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on December 8, 1966 (Pet. App. A). On December 29, 1966, Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to February 6, 1967 (Pet. App. C), and the petition was filed on

that day. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's statements made to customs officers were properly admitted in evidence.

2. Whether 21 U.S.C. 176a, in allowing the jury to infer knowledge of illegal importation from possession of marihuana, violates the Fifth Amendment, either because it compels the defendant to testify in his own behalf or because there is no rational connection between the fact of possession and the inference of guilty knowledge.

3. Whether there was sufficient evidence to establish petitioner's knowing possession of the marihuana.

4. Whether certain instructions by the trial court were confusing or otherwise prejudicial.

STATUTE INVOLVED

21 U.S.C. 176a provides in part:

> Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had the marihuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury.

STATEMENT

Petitioner was convicted in the United States District Court for the Southern District of California of

smuggling (Count 1) and concealing (Count 2) marihuana in violation of 21 U.S.C. 176a, and of smuggling merchandise (Count 3) in violation of 18 U.S.C. 545. On May 2, 1966, he was sentenced to imprisonment for six years on Counts 1 and 2, and for three years on Count 3, all terms to be served concurrently. The court of appeals affirmed the convictions *per curiam*.

The evidence showed that on December 19, 1965, petitioner was stopped at the Mexican border at San Ysidro in California. After petitioner stated that he was a returning United States citizen, a customs agent observed four chalk cats in the rear seat. Thinking this purchase unusual, the agent referred petitioner to a secondary inspection area where he was personally searched (Tr. 26-28, 34).[1] At this time, petitioner claimed that he owned the car (Tr. 34). A search of the car revealed thirty pounds of marihuana and marihuana debris and seeds underneath the rear seat and in the trunk (Tr. 35, 44). Agent Yates also discovered a loaded revolver and holster concealed in the right side arm rest (Tr. 35). Petitioner was then advised of his right against self-incrimination, and was offered the use of a telephone to call an attorney; the offer was declined (Tr. 89). Upon questioning by customs agent Aros, petitioner recanted his previous claim to ownership of the automobile and said it belonged to a Joe Smith who lived "somewhere in the four thousand block, Comp-

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[1] "Tr." designates Transcript of Trial filed with the Clerk of this Court.

ton Avenue in Los Angeles" (Tr. 90). He refused to discuss the case any further. A subsequent independent investigation by customs officers revealed that the automobile was registered in the name of Joseph Smith, whose address was 68 East 45th Street, Los Angeles (Tr. 93).

Petitioner testified that he went to Mexico to watch the races with Joe Smith; that Joe Smith later told him to drive his automobile back to Los Angeles alone, as he (Smith) was going to return to Los Angeles with a girl friend whom he met in Mexico. Petitioner testified that after having a few drinks he returned to the border, where he was apprehended, and that he had no knowledge at the time that the marihuana and other contraband were concealed in the automobile.

ARGUMENT

1. Petitioner contends that it was error to admit into evidence his two statements—that he owned the automobile and (later) that the automobile was owned by Joseph Smith—on the ground that the customs officers failed to advise him that if he were financially unable to retain an attorney the court would appoint one for his defense. He cites *Miranda* v. *Arizona*, 384 U.S. 436. But assuming *arguendo* that his statements were made to the customs officers during a custodial interrogation—the only situation to which the *Miranda* decision applies—petitioner can take no comfort from that decision since his trial was

commenced prior thereto. *Johnson* v. *New Jersey*, 384 U.S. 719.[2]

2. Petitioner contends that the provision of 21 U.S.C. 176a that possession of marihuana "shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury" is inconsistent with the self-incrimination and due process clauses of the Fifth Amendment.

a. There is no occasion to re-examine this Court's holding in *Yee Hem* v. *United States*, 268 U.S. 178, that the legislative inference allowed by 21 U.S.C. 174 (which in this respect is identical to that in 21 U.S.C. 176a) does not compel the defendant to testify in his own behalf. Cf. *United States* v. *Gainey*, 380 U.S. 63. If petitioner chooses not to explain his possession of the marihuana, the jury may, but it is not compelled to, infer that he was aware of the illegal importation. No compulsion in the constitutional sense is involved. The choice remains with petitioner. To be sure, he may be convicted if he fails to testify in his own behalf—but that is true in every case where the government makes a *prima facie* show-

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[2] Petitioner in effect asks reconsideration of the *Johnson* decision, in which this Court declined to apply *Miranda* retrospectively. He relies primarily upon a statement made by the Chief Justice, writing for the majority in *Miranda*, that the applicability of the Fifth Amendment to custodial interrogation had been decided some seventy years ago in *Bram* v. *United States*, 168 U.S. 532. Never, however, until *Miranda*, had this Court held that the failure to advise an accused of his right to appointment of counsel violated the Fifth Amendment.

ing of guilt. In addition, a defendant can exculpate himself through the evidence of other witnesses, not only through his own testimony.

b. Notwithstanding the argument that it "is almost the subject of judicial notice that marijuana is grown, albeit illegally, in many areas of the United States" (Pet. 19-20), the presumption of illegal importation has consistently been held rational and valid. This conclusion is especially forceful in a case like this where the marihuana is in an "unmanicured" form. *Caudillo* v. *United States*, 253 F. 2d 513 (C.A. 9), certiorari denied *sub nom. Romero* v. *United States*, 357 U.S. 931; *Butler* v. *United States*, 273 F. 2d 436 (C.A. 9); *United States* v. *Taylor*, 266 F. 2d 310 (C.A. 7), certiorari denied, 361 U.S. 853; *Anthony* v. *United States*, 331 F.2d 687 (C.A. 9). We stress the additional fact in this case that petitioner was apprehended at the border upon his return from Mexico. In these circumstances, at least, petitioner cannot tenably deny a rational connection between the fact of his possession and the inference of illegal importation.

3. Petitioner further contends that, even if the legislative inference allowed by 21 U.S.C. 176a is valid, there was insufficient evidence to establish that he had knowing possession of the marihuana and other contraband. Knowing possession may be proved circumstantially (*Evans* v. *United States*, 257 F. 2d 121, 128 (C.A. 9), certiorari denied, 358 U.S. 866; *United States* v. *Pinna*, 229 F. 2d 216, 218 (C.A. 7)), and proof that one has exclusive control and

dominion over the property on or in which contraband marihuana is found is sufficient to establish knowledge of the presence of such marihuana (*Travis* v. *United States*, 362 F. 2d 477 (C.A. 9), certiorari denied, 385 U.S. 885; *Evans* v. *United States*, *supra*; *Bass* v. *United States*, 326 F. 2d 884, 886-887 (C.A. 8), certiorari denied, 377 U.S. 905; *Johnson* v. *United States*, 270 F. 2d 721, 723 (C.A. 9)). The facts set forth in the Statement, *supra*, pp. 2-4, amply justify the conclusion that petitioner knew the marihuana was in the automobile, and that he had possession and control over the marihuana. In the circumstances, the jury was entitled to disbelive petitioner's denial of knowledge.

4. Petitioner complains that certain instructions by the court explaining the difference between actual and constructive possession (Pet. App. E) were confusing and prejudicial. Specifically, he argues that the court assumed knowing possession on the part of petitioner and conveyed that assumption to the jury. However, just prior to the portion of the charge about which petitioner complains, the court instructed (Tr. 129-130):

> The court advises you, of course, that [possession within the meaning of 21 U.S.C. 176a] must be a knowing possession.
>
> * * * *
>
> Thus, if you find from the evidence, beyond a reasonable doubt, that there was possession, as that term will be defined to you, on the part of the defendant of any of the marijuana referred

> to in the indictment, such possession creates a permissible inference of guilt as charged in the indictment.

It is presumed that the jury followed all the court's instructions and so found that petitioner did in fact have a knowing possession of the marihuana before it considered the legislative inference. See *Della Paoli* v. *United States*, 352 U.S. 232, 242; *Opper* v. *United States*, 348 U.S. 84, 95.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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